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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL
43QJ-109903 BY PHILIP J. AND	)	ORDER
PAMELA M. NASH	)	

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the March 26, 2001, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

**ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 43QJ-109903 is **ISSUED** to Philip J. and Pamela M. Nash to appropriate 3.9 cfs up to 54 acre-feet of water per year from an unnamed tributary of the Yellowstone River, that is also known as the Vandenberg Drain Ditch, at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 27, Township 2 South, Range 23 East, in Stillwater County, Montana. The means of diversion is by pump located in a sump adjacent to and filled from the Vandenberg Drain Ditch. The period of appropriation and period of use is March 15 through October 15, inclusive, of each year. The use is irrigation. The place of use

is 18 acres in the W~~1~~SE~~4~~ of Section 27, Township 2 South, Range 23 East, Stillwater County, Montana.

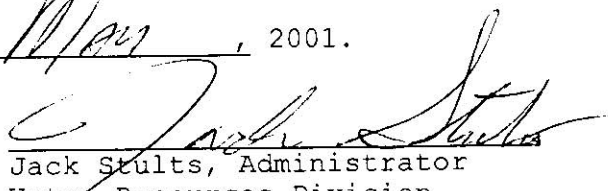
A. The combined volume of irrigation water from this Permit and water right 43QJ-W195792 shall not exceed the crop requirement for the overlapping place of use, or the limits of the individual rights.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 14<sup>th</sup> day of May, 2001.

  
Jack Stults, Administrator  
Water Resources Division  
Department of Natural  
Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 16<sup>th</sup> day of May, 2001.

PHILIP J & PAMELA M NASH  
505 CEMETARY RD  
PARK CITY MT 59063

GREG MURPHY  
MOLTON, BELLINGHAM, LONGO, & MATHER  
PO BOX 2559  
BILLINGS MT 59103

JOHN L MOHR  
PO BOX 219  
LAUREL MT 59044

KAPPELL LIMITED LIABILITY CO  
45 SCHREINER ROAD  
PARK CITY MT 59063

ROY D EISENMAN  
1449 HOLLOWAY  
SHERIDAN WY 82801

ESTATE OF DONALD J EISENMAN  
ATTN ROY D EISENMAN  
1449 HOLLOWAY  
SHERIDAN WY 82801

KEITH KERBEL, MANAGER  
MARTY VAN CLEAVE, WRS  
BILLINGS REGIONAL OFFICE  
AIRPORT INDUSTRIAL PARK  
1371 RIMTIP DRIVE  
BILLINGS MT 59105-1978

CURT MARTIN, CHIEF  
WATER RIGHTS BUREAU  
PO BOX 201601  
48 N LAST CHANCE GULCH  
HELENA MT 59620-1601

  
Jennifer L. Hensley  
Hearings Unit  
406-444-6615

*Chase*

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA  
\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT 43QJ- )  
109903 BY PHILIP J. AND PAMELA M. )  
NASH )

PROPOSAL  
FOR  
DECISION

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on March 7, 2001, in Billings, Montana, to determine whether a beneficial water use permit should be issued to Philip and Pamela Nash for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant appeared by and through counsel Gregory M. Murphy. Philip Nash testified for the Applicant. Wes Thatcher, area landowner, and Robert Kappel, Objector, were called to testify by the Applicant.

Objectors Kappel Limited Liability Co., Roy D. Eisenman, and Estate of Donald J. Eisenman appeared by and through counsel John. L. Mohr. Robert Kappel appeared as a witness for the Objectors.

Keith Kerbel, Manager, Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (hereafter Department), was called to testify by the Applicant and the Objector.

EXHIBITS

Applicant offered fourteen exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1-11, 13, 15, and 17. Exhibits 12, 14, and 16 were not offered.

**Applicant's Exhibit 1** is a copy of a warranty deed from Namen to Nash.

**Applicant's Exhibit 2** a six page copy of the Nash title insurance policy for Certificate of Survey 267180.

**Applicant's Exhibit 3** is a large one page copy of Certificate of Survey 267180.

**Applicant's Exhibit 4** is a twelve page copy of the Nash Water Use Permit Application that has not be marked received by the Department.

**Applicant's Exhibit 5** is a two page copy of Statement of Claim number 43QJ-W195792.

**Applicant's Exhibit 6** is a two page copy of Statement of Claim number 43QJ-W195791.

**Applicant's Exhibit 7** is a copy of an *Acknowledgement of Water Right Transfer* for water right number 43QJ-W195792-00.

**Applicant's Exhibit 8** contains three pages; a copy of a check to Jim Namen, a Department October 6, 1995 letter, and a *Late Claim Processing Fee Invoice*.

**Applicant's Exhibit 9** is a one page copy of two DNRC receipts; one for \$30 received on February 8, 2000 for "adding names to the Vandenberg Drain Ditch", and one for \$200 received February 9, 2000 for a "water permit."

**Applicant's Exhibit 10** is a copy of a *Notice to Water Users* for application number 43QJ-109903.

**Applicant's Exhibit 11** consists of three pages of photographs of the Vandenberg Drain Ditch labeled A, B, C, D, E, F, and G.

**Applicant's Exhibit 13** a copy of the Kappel Limited Liability Company *Objection to Application* 109903-43QJ.

**Applicant's Exhibit 15** is a five page copy of a Contract regarding the Vandenberg Drain Ditch.

**Applicant's Exhibit 17** is a hand drawn plan view sketch by Philip Nash of the diversion sump and its connection to the Vandenberg Drain Ditch.

Objector offered no exhibits for the record.

#### **PRELIMINARY MATTERS**

The Objections of Kappel Limited Liability Co., Roy D. Eisenman, and Estate of Donald J. Eisenman, were consolidated at the beginning of the hearing.

During testimony Applicant Philip Nash stated 1750 gallons per minute (hereafter gpm), or 3.9 cubic feet per second (hereafter cfs),

is the amount needed for their irrigation needs, and not the 4.45 cfs (2000 gpm) on the application.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

**FINDINGS OF FACT**

1. Application for Beneficial Water Use Permit 43QJ-109903 in the name of and signed by Philip and Pamela Nash was filed with the Department on February 9, 2000. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 3.9 cfs up to 54 acre-feet of water per year from an unnamed tributary of the Yellowstone River, that is also known as the Vandenberg Drain Ditch, at a point in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 27, Township 2 South, Range 23 East, in Stillwater County, Montana. The proposed means of diversion is by pump. The proposed period of appropriation and period of use is March 15 through October 15, inclusive, of each year. The proposed use is irrigation. The proposed place of use is 18 acres in the W $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 27, Township 2 South, Range 23 East, Stillwater County, Montana. The proposed place of use and the place of use for water right 43QJ-W195792 overlap. (Department file, testimony of Philip Nash)
4. Applicant has proven water is physically available. Applicant estimated flows in the source at their point of diversion using known culvert sizes through Vandenberg Drain Ditch crossing sites and head-discharge relationship to estimate flows of 6000-7000 gpm during summer season. The flow in the source is dependant upon upstream irrigation, spring flows, and precipitation events, and varies throughout the irrigation season. (Department file, Philip Nash testimony)
5. Applicant has proven water is legally available. Applicant found no downstream appropriators in the Department records; however, Department staff did, and mailed them individual notices of the

intended appropriation. In addition to flows in the source, there are downstream tributary waters, not specifically located on the record, to the source which are adequate for downstream stockwater rights from the source. Applicant has operated the diversion during recent dry climactic seasons without complaint from downstream appropriators. (Department file, testimony of Philip Nash, Keith Kerbel)

6. Applicant has proven there will be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. In addition to flows in the source, there are downstream tributary waters to the source which are adequate for downstream stockwater rights from the source. Applicant has operated the diversion during recent dry climactic seasons without complaint from downstream appropriators. Applicant can shut off the diversion pump if needed to respond to a downstream call by a senior appropriator. (Department file and records, testimony of Philip Nash, Keith Kerbel)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. Applicant will partially dam the source to back water into his diversion sump located about fifty feet from the Vandenberg Drain Ditch. When Applicant dams the source, the water level will not increase the depth of water at the adjacent upstream owner's Vandenberg Drain Ditch crossing beyond recent levels, nor will damming the source cause overtopping of the Vandenberg Drain Ditch. Applicant has used the means of diversion for at least two seasons.

Objectors have no water rights that are in jeopardy by the proposed appropriation. Objectors' concern is that diversion by this method from the private Vandenberg Drain Ditch will cause damage at Objectors' upstream property by raising the groundwater levels in the area. Applicants must show their proposed system can be constructed and operated to divert and deliver the amount of water requested without waste, and to allow control of the amount of water diverted such that it can be regulated in accordance with the system of priority on the source. Here Applicants have done that. The Department has no jurisdiction in matters pertaining to property

damage or ditch rights. Even if it did, there is no evidence in the record, beyond conjecture, that this diversion has increased the groundwater levels at the Objectors' property located one-half mile upstream and ten feet higher in elevation from the Applicant.

(Department file, Department records, testimony of Philip Nash, Robert Kappel)

8. Applicant has proven the proposed use of water for irrigation is beneficial when all rights appurtenant to the place of use are limited to the crop requirements. The amount of water is reasonable for alfalfa irrigation in the area. (Department file, Department records, testimony of Keith Kerbel)

9. Applicant has proven they have possessory interest in the property where the water is to be put to beneficial use. (Department file, testimony of Philip Nash)

10. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

#### **CONCLUSIONS OF LAW**

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. Applicant has met the criteria for issuance of a beneficial water use permit. See Findings of Fact 4 through 9. Mont. Code Ann. §85-2-311 (1999)

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

#### **PROPOSED ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 43QJ-109903 is **ISSUED** to Philip J. and Pamela M. Nash to appropriate 3.9 cfs up to 54 acre-feet of water per year from an unnamed tributary of the Yellowstone River, that is also known as the Vandenberg Drain Ditch, at a point in the



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A. The combined volume of irrigation water from this Permit and water right 43QJ-W195792 shall not exceed the crop requirement for the overlapping place of use, or the limits of the individual rights.

**NOTICE**

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 26<sup>th</sup> day of March, 2001.



Charles F Brasen  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 26<sup>th</sup> day of March, 2001.

PHILIP J & PAMELA M NASH  
505 CEMETARY RD  
PARK CITY MT 59063

GREG MURPHY  
MOLTON, BELLINGHAM, LONGO, & MATHER  
PO BOX 2559  
BILLINGS MT 59103

JOHN L MOHR  
PO BOX 219  
LAUREL MT 59044

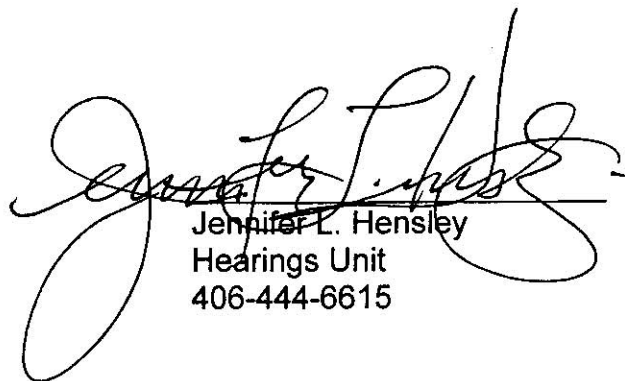
KAPPELL LIMITED LIABILITY CO  
45 SCHREINER ROAD  
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BILLINGS REGIONAL OFFICE  
AIRPORT INDUSTRIAL PARK  
1371 RIMTIP DRIVE  
BILLINGS MT 59105-1978

CURT MARTIN, CHIEF  
WATER RIGHTS BUREAU  
PO BOX 201601  
48 N LAST CHANCE GULCH  
HELENA MT 59620-1601



Jennifer L. Hensley  
Hearings Unit  
406-444-6615